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No. 212

In the Supreme Court of the United States

OCTOBER TERM, 1957

THOMAS E. ANDERSON, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. A, pp. 28–32) is reported at 150 F. Supp. 881.[1]

JURISDICTION

The decision of the Court of Claims was entered on May 8, 1957. (Pet. App. A, p. 28). The petition for a writ of certiorari was filed on June 21, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

[1] It should be noted that the opinion as reproduced in petitioners' appendix contains numerous phrases and sentences which are italicized. Those italics do not actually appear in the court's opinion (R. 147–150).

QUESTION PRESENTED

Whether Congress has authorized payment for time spent by post office clerks, at home and outside their regular hours of duty, in studying for certain examinations required by postal regulations.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 11–17.

STATEMENT

By suit filed in the Court of Claims, petitioners, fifteen mail distribution clerks in the employ of the Post Office Department, sought to recover overtime pay for time spent by them, at home and outside their regular hours of duty, studying for Post Office scheme examinations (R. 1–7). The Court of Claims dismissed the complaint, holding unanimously that the overtime compensation provisions of the Act of July 6, 1945, *infra*, p. 13, upon which petitioners attempted to ground their claims, were plainly not intended to provide compensation for the at-home study engaged in by the petitioners (Pet. App. A, pp. 28–32).[2]

The relevant facts are as follows:

Each of the petitioners is, and has been at all material times, an employee of the Post Office Department assigned to the distribution of mail (R. 3). The distribution function entails knowledge and memori-

[2] Petitioners also sought to be reimbursed for certain materials that they had purchased to assist them in their home study of the Post Office schemes (R. 6). The lower court also denied this claim (Pet. App. A., p. 32). Petitioners do not urge as error the court's ruling in this regard.

zation of "schemes" or patterns of distribution, set up and issued by the Post Office Department, showing how each post office is supplied by mail.[3] Since knowledge of a scheme or set of schemes is required for performance of the distributing clerk's job, each of the petitioners was informed, upon his becoming a distributing clerk, that he would have to attain and maintain a certain degree of accuracy and speed with respect to the schemes that related to his assignment and that, as to his original assignment, examinations would be given every few months until he could demonstrate his ability to perform (*i. e.*, distribute) in accordance with fixed standards (R. 3).

In addition, each petitioner was informed that after completion of the examination on his initial assignment he would have to take and pass periodic examinations (usually annual) on sections of the scheme assignment. (*Ibid.*)[4] Passing of these examinations, called "case examinations," was necessary for the

[3] General schemes are printed lists of all post offices in a State showing how each office is supplied by mail. A city scheme is a list indicating the routing of city mail to carriers, box sections, stations, and branches.

[4] The court below noted (Pet. App. 29, fn. 1) that:

"Although sufficient distributing clerks are absolutely essential to the establishment and maintenance of an efficient postal service and although periodic examinations appear to be, after long years of trial and experience, the only way to insure proficiency, nevertheless the Post Office Department has narrowed the otherwise mandatory requirement of examination passing so that:

"(1) Clerks not called upon to perform any distribution except during the Christmas period should be given a simple

employee's retention of his distributing clerk's job (R. 4).[3] In order to pass a case examination, each employee, of course, had to engage in a certain amount of study, depending upon his memory, ability, and practice in the use of the schemes.[4]

The study is not authorized to be performed "on the clock," *i. e.*, during the employee's 8-hour tour of duty

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primary scheme of distribution, such as is furnished temporary employees for study incident to handling Christmas mails. * *. * These employees should be relieved of any other scheme requirements during the remainder of the year. Manual of Instructions for Postal Personnel (1948) Chapt. III, Art. 55 (d).

[4] "(2) No clerk shall be examined on any scheme that he is not required to use regularly, either daily, monthly, or at seasonal or peak periods, except that this shall not apply to clerks or substitutes who may be preparing for such assignment. No clerk shall be examined more than once each year on a scheme on which he has qualified." Manual *Op. cit.*, *supra* (e).

"(3) Clerks past 55 years of age, or who have been in the service for 25 years, are exempt from examinations, but any distributor who permits himself to become inefficient in the performance of his duties shall be required to qualify again by passing a satisfactory scheme examination. Manual *Op. cit.*, *supra* (j)."

[5] Manual of Instructions for Postal Personnel (1948), Appendix A, Art. 59.

[6] The petition erroneously asserts that there is no disagreement as to the fact that study for scheme examinations "* * * was difficult and time consuming, requiring the highest degree of concentration and persistence" (Pet. 21). On the contrary, as was pointed out to the court below, knowledge of distribution schemes required is comparatively simple and "once a clerk has completed his study of the schemes necessary for the separation of mails distributed by him, examinations on the schemes are required only once a year. As the scheme of distribution normally follows the actual dispatch of mail distributed by the clerk each day, little additional study is necessary to prepare for the scheme examination." (R. 38.)

at his job (R. 4).[7] By the same token, neither compensatory time, nor straight time pay, nor time and a half pay has been or is being paid to employees for their home study for case examinations.

ARGUMENT:

The Court of Claims has rejected petitioners' attempt to obtain overtime compensation for time spent by them, in their own homes, studying for case examinations. It is clear beyond question that compensation for such study is not authorized by the Act of July 6, 1945, *infra*, p. 13, relied upon by petitioners, or any other statute. The decision of the Court of Claims is plainly right and presents no conflict with any other court decision. Further review by this Court is unnecessary.

1. The Act of July 6, 1945, *infra*, p. 13, is essentially an *in haec verba* repetition of its predecessor statute—

[7] Petitioners assert (Pet. 13, 25, 26) that post offices, other than those in which they are employed, pay employees, similarly situated, for "on the clock" scheme study. The plain fact is that the Postmaster General, acting under the authority of R. S. 396; 42 Stat. 25, "to instruct all persons in the Postal Service with reference to their duties," has instituted, at a few post offices, for new or substitute employees only, an "experimental supervised on-the-clock scheme study program * * * to determine the feasibility of the current method of learning schemes" (R. 26). It is apparent that such experimentation with "on the clock" study periods, instituted under the authority of R. S. 396 and entirely discretionary on the part of the Postmaster General, is irrelevant to the problem of whether the Act of July 6, 1945, provides pay for at-home study.

the Act of February 28, 1925, 43 Stat. 1053, 1059.[8] That Act had been uniformly construed by the Post Office Department and the Comptroller General to provide for the payment of overtime only where an employee, in time of emergency or because of the needs of the service, worked on the job in excess of eight hours and not to provide for overtime where the employee studied for case examinations "off the clock."

In *Deland* v. *United States*, 77 C. Cls. 55, the Court of Claims, rejecting a comparable claim for compensation for at-home scheme study, upheld the administrative construction of the statute. Prior to the *Deland* decision in 1933, there had been introduced in Congress some five bills to require the Post Office Department to provide "on the clock" time for case examination study or to provide pay for such study.[9]

[8] The 1925 Act, 43 Stat. 1058, 1059, provided:

"* * * [I]*n cases of emergency, or if the needs of the service require*, and it is not practicable to employ substitutes, *special clerks, clerks, and laborers, in first and second class post offices and carriers in the City Delivery Service can be required to work in excess of eight hours per day, and for such overtime service they shall be paid* on the basis of the annual pay received by such employees * * *." (Emphasis supplied.)

The 1945 Act here involved (59 Stat. 435) provides:

"*In emergencies or if the needs of the service require, employees may be employed in excess of eight hours per day and for such overtime service they shall be paid* on the basis of 150 per centum of the annual rate of pay received by such employees * * *." (Emphasis supplied.)

It will be observed that the wording of the two statutes, insofar as the statutes define the terms and conditions for the payment of overtime, is the same.

[9] H. R. 4846, 68th Cong., 1st Sess.; H. R. 5018, 69th Cong., 1st Sess.; H. R. 7457, 70th Cong., 1st Sess.; H. R. 6796, 71st Cong., 2d Sess.; H. R. 444, 72nd Cong., 1st Sess.

Congress, well aware of the consistent administrative interpretation of the pay statutes insofar as scheme study was concerned, and also aware of the expense to the Government of either type of bill, had refused to enact them. Declining to accomplish judicially that which had been denied by Congress, the Court of Claims in *Deland* observed:

> * * * The post office had authority to require him to pass examinations for the purpose of determining whether he was qualified to fill the position. The law applicable to the case has been in force many years and under it compensation has always been denied for such work as that for which plaintiff now demands pay. Proposals have been made to modify the law and the attention of Congress has been called to the practice of the Post Office Department, but Congress has refused to take any action. We think the action of the Department and the ruling of the Comptroller General are in accordance with the proper construction of the statutes applicable to the question involved, and if there were any doubt about the matter it has been removed by long continued practice during which period Congress has refused to modify the law. [*Deland* v. *United States*, 77 C. Cls. 55, 56–57.]

From the time of the *Deland* decision until passage of the Act of July 6, 1945, there were introduced seven other bills aimed at providing either pay or "on the

clock" time for ease examination study.[10] These bills also failed of passage.[11]

In the light of the *Deland* decision, and the continuing refusal of Congress, fully aware of the demands, to provide compensation for scheme study, it is difficult to see how petitioners can seriously argue that the Act of July 6, 1945, an *in haec verba* repetition of the 1925 Act (see fn. 8, *supra*, p. 6), was intended to establish, by its general terms, this novel fiscal obligation on the part of the Government. Surely, if Congress, in passing the Act of 1945, wished to change the well recognized construction of its terms and provisions, and to provide therein for a tremendously increased governmental obligation,[12] it would have done so by the use of clear and plain language. See *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196. On the other hand, where a statutory provision, such as the provision of the 1925 Act defining the terms and conditions for the

[10] H. R. 1707, 73rd Cong., 1st Sess.; H. R. 45, 74th Cong., 1st Sess.; H. R. 4647, 75th Cong., 1st Sess.; H. R. 995, 76th Cong., 1st Sess.; H. R. 2760, 77th Cong., 1st Sess.; H. R. 68, 78th Cong., 1st Sess.; H. R. 465, 79th Cong., 1st Sess.

[11] Similarly, eight bills introduced since the Act of July 6, 1945, have failed to succeed. See H. R. 98, 80th Cong., 1st Sess.; H. R. 246, 81st Cong., 1st Sess.; H. R. 127, 82nd Cong., 1st Sess.; H. R. 1416, 83rd Cong., 1st Sess.; H. R. 1425, 83rd Cong., 1st Sess.; H. R. 81, 83rd Cong., 1st Sess.; H. R. 183, 84th Cong., 1st Sess.; H. R. 543, 84th Cong., 1st Sess.

[12] There is no way of estimating the expense to which the Government would be subjected if petitioners' theory were to prevail, for there would be no way of checking or controverting the various home study figures submitted. The cost of providing "on the clock" compensation—which *could* be subject to check and supervision—has been estimated by the Post Office to be as high as $37,000,000 a year (R. 37).

payment of overtime, has been accorded a consistent administrative or judicial interpretation and the statutory provision is reenacted without material change, the administrative or judicial interpretation must be deemed to have received legislative approval. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459; *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552.

2. Equally without merit is petitioners' assertion that support for their theory can be found in cases, involving claims by non-federal employees, decided under the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended.

That Act, as construed recently by this Court in *Mitchell* v. *King Packing Co.*, 350 U. S. 260, and *Steiner* v. *Mitchell*, 350 U. S. 247, requires payment for certain time spent by employees *on the premises of their employer*. In *Steiner* the Court held that employees working with caustics and toxic material and compelled to take showers *on the employer's premises* were entitled to be paid for the time spent in changing and washing. The *King Packing* case denominated as a part of their principal activities (and hence compensable) time spent by employees *on the employer's premises* in sharpening the knives with which they worked. To the same effect are *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, and *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers*, 325 U. S. 161, both cases holding compensable the time spent by miners in underground travel in their employers' mines. In some few cases, work performed at home or off the employer's premises was held to be compensable but only where (1)

the employee brought in tangible evidence of having worked (*i. e.*, bookkeeper's reports, *Barker* v. *Georgia Power & Light Co.*, 1942, 2 W. H. Cases 486, and reporter's reviews of motion pictures, *Republican Publishing Co.* v. *American Newspaper Guild*, 172 F. 2d 943 (C. A. 1)) or (2) the employee was in a place or area either under employer supervision or where his attendance could be noted (*i. e.*, attending conferences and employer's school of instruction, *Chepard* v. *May*, 71 F. Supp. 389 (S. D. N. Y.)):

Plainly, the Fair Labor Standards Act and the cases decided thereunder, apart from the fact that they are inapplicable to federal employment, offer no support for petitioners' claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

Section 1 of the Act of July 6, 1945, 59 Stat. 435 (39 U. S. C. 851) provides:

> The term "employees" wherever used in this Act shall include officers, supervisors, special-delivery messengers in offices of the first class, and all other employees paid from field appropriations of the Postal Service, other than postmasters, skilled-trades employees of the mail-equipment shops, job cleaners in first- and second-class post offices, and employees who are paid on a fee or contract basis.

Section 2 of the Act of July 6, 1945, 59 Stat. 435, (39 U. S. C. 852) provides:

> Employees shall be required to work not more than eight hours a day except as provided in section 4. The eight hours of service shall not extend over a longer period than ten consecutive hours, and the schedules of duty of the employees shall be regulated accordingly: *Provided*, That the provisions of this section shall not apply to employees of the Railway Mail Service and the Air Mail Service; post-office inspectors; rural carriers; traveling mechanicians; examiners of equipment and supplies; employees in third-class post offices; employees paid on an hourly basis; employees not in the automatic or additional annual salary grades; and carriers in the Village Delivery Service: *Provided further*, That any classified substitute employee who reports for duty at any post office or other postal unit in compliance with an official order shall be employed not less than two hours following the hour at which such classified substitute employee is ordered to report. Employment in any branch

of the Postal Service will be construed as compliance with this proviso.

Section 3 of the Act of July 6, 1945, 59 Stat. 435, as amended (39 U. S. C. 853) provides:

(a) When the needs of the service require employees, to perform service on Saturdays, Sundays, or holidays, such employees shall be allowed compensatory time for such service on one day within five working days next succeeding the Saturday or Sunday and within thirty days next succeeding the holiday.

(b) If the service so performed on Saturdays and Sundays is less than eight hours, such service may, in the discretion of the Postmaster General, be carried forward and combined with similar service performed on other Saturdays and Sundays, and such employees may be allowed compensatory time for such combined service or any part thereof at any time, except that, whenever at least eight hours of such service has been accumulated, such employees shall be allowed eight hours compensatory time on one day within five working days next succeeding the Saturday or Sunday on which the total accumulated service was at least eight hours.

(c) The Postmaster General may, if the exigencies of the service require, authorize the payment of overtime to employees other than supervisory employees whose base salaries, exclusive of longevity salary, are more than $4,970 per annum, for services performed on Saturdays, Sundays, and Christmas Day during the month of December, in lieu of compensatory time.

(d) Supervisory employees shall be allowed compensatory time for services performed in excess of eight hours per day, and those whose base salaries, exclusive of longevity salary, are more than $4,970 per annum shall be allowed compensatory time for services performed on

Saturdays, Sundays, and on Christmas Day during the month of December, within one hundred and eighty days from the days such service was performed.

(c) The provisions of this section shall not apply to employees in the Postal Transportation Service; post-office inspectors; rural carriers; traveling mechanicians; examiners of equipment and supplies; clerks in third-class post offices; and employees paid on an hourly basis.

Section 4 of the Act of July 6, 1945, 59 Stat. 435 (39 U. S. C. 834) provides:

> In emergencies or if the needs of the service require, employees may be employed in excess of eight hours per day and for such overtime service they shall be paid on the basis of 150 per centum of the annual rate of pay received by such employees. In computing compensation for such overtime employment, the annual salary or compensation for such employees shall be divided by two thousand and eighty, the number of working hours in a year. The quotient thus obtained will be the base hourly compensation and one and one-half times that amount will be the hourly rate of overtime pay: *Provided*, That the provisions of this section shall not apply to employees of the Railway Mail Service and the Air Mail Service; post-office inspectors; rural carriers; traveling mechanicians; examiners of equipment and supplies; employees paid on an hourly basis, and supervisory employees.

Chapter III, Art. 55 of the Manual of Instructions for Postal Personnel [1948] provides:

> CASE EXAMINATIONS
>
> 55. Case examinations shall be given on official time as follows:
>
> (a) At offices of the first class having a superintendent of mails, all clerks regularly

assigned to the distribution of mail, either incoming or outgoing, and all substitute clerks, shall be examined yearly on the distribution schemes in use in their offices. Such examinations shall be conducted by the superintendent of mails. On outgoing mail a scheme comprises a State or section of a State, in accordance with divisions made by the Railway Mail Service. On incoming mail a scheme comprises a city primary, a city secondary, or a station distribution. Where a State or city is divided into two or more sections, one section will constitute a complete scheme for examination purposes. Complete city schemes of more than 1,200 cards shall be divided into sections, each section to contain not less than 600 cards.

(b) At city delivery offices all substitute clerks should be assigned to and must qualify on the city scheme, and all clerks in the mailing division, other than those regularly assigned to scheme distribution and those needed as reserves for such scheme distribution of outgoing mail, must qualify on the city delivery scheme. A scheme assignment on the distribution of outgoing mail is the State or States the mail for which a clerk may be required to distribute. An assignment on incoming mail may embrace a primary distribution, and one or two section or station distributions, or, where there is no primary, two or three section or station distribution. An assignment may embrace both incoming and outgoing distribution. Upon being given an assignment, a clerk shall as a rule be required to qualify on one scheme each 3 months until he shall have covered his entire assignment, after which he shall be required to pass at least one examination annually, provided that an entire assignment must be covered within 3 years. At offices where the needs of the service demand, additional examinations may be required. At offices having a superintendent of mails, in cases where a standpoint

scheme is regularly used the examination should be based thereon if feasible, the scheme to be made up by the superintendent of mails and approved by the general superintendent or district superintendent of the Railway Mail Service.

(c) Clerks in the registry section shall qualify on either the outgoing or city scheme, their assignment to govern the examination given. Nondistribution employees whose services are not required or utilized in a distributing capacity at seasonal or peak periods of the day, month, or year shall not be required to qualify or pass examination on any scheme. However, where the services of such employees are utilized and where it is practicable to use their services in distribution work during seasonal or peak periods of the day, month, or year, they shall be required to qualify on the city primary or part of the city delivery scheme.

(d) Clerks not called upon to perform any distribution except during the Christmas period should be given a simple primary scheme of distribution, such as is furnished temporary employees for study incident to handling Christmas mails. They should be furnished with such primary schemes in November and be required to qualify thereon about December 1 of each year. These employees should be relieved of any other scheme requirements during the remainder of the year.

(e) No clerk shall be examined on any scheme that he is not required to use regularly, either daily, monthly, or at seasonal or peak periods, except that this shall not apply to clerks or substitutes who may be preparing for an assignment. No clerk shall be examined more than once each year on a scheme on which he has qualified.

(f) At first-class offices not having a superintendent of mails, all clerks, including assistant postmasters who distribute mail 1 hour or

more daily, in accordance with a general scheme prepared by the Railway Mail Service, or who from time to time are assigned to assist in such distribution during rush hours or periods of congestion, shall be examined once yearly on the distribution schemes in use in their offices. Such examinations on dispatching schemes shall be conducted by district superintendents of the Railway Mail Service, and on city schemes by the postmaster or assistant postmaster.

(g) At second-class offices examinations on dispatching schemes will be conducted by district superintendents of the Railway Mail Service when conditions indicate that clerks, including assistant postmasters, who distribute mail 1 hour or more daily, in accordance with a general scheme prepared by the Railway Mail Service, or who from time to time are assigned to assist in such distribution during rush hours or periods of congestion, should have some knowledge of dispatching scheme distribution. Clerks shall be examined once yearly on the schemes at the times designated by the district superintendents. Examinations on city schemes, if necessary, shall be conducted by the postmaster or assistant postmaster.

(h) A record of 95 percent and an average of not less than 16 cards correctly thrown per minute on case examinations shall be required. Clerks making lower grades shall be demerited in accordance with the schedule shown in the "Postal Service Rating System" and reexamined, and those failing upon the fourth trial may be considered for removal. Clerks who fail to qualify should, as a rule, be allowed 30 days in which to prepare for reexamination. Clerks who fail to report for examination on the date scheduled should be demerited and rescheduled without further opportunity to prepare for examination.

(i) The speed and percentage attained in case examinations shall be recorded separately on Form 3989, in duplicate, the carbon copy of the form being sent to the employee and the original being filed in the employee's individual record jacket.

(j) Clerks past 55 years of age, or who have been in the service for 25 years, are exempt from examinations, but any distributor who permits himself to become inefficient in the performance of his duties shall be required to qualify again by passing a satisfactory scheme examination.

(k) Postmasters shall see that there are a sufficient number of trained distributors available to meet any situation which may arise, and good judgment should be exercised not to require clerks to qualify on schemes which they will not be required to use.

(l) Careful attention should be given to the training of substitutes to become good distributors, and they shall not be exempt from examinations.

Appendix A, Art. 59 of the Manual of Instructions for Postal Personnel [1948] is the schedule of demerits for "Offenses Against Discipline and General Delinquencies". In pertinent part, it provides:

Case Examinations

Failure to report when due, failure to be prepared or to qualify on first attempt	50
Second failure	75
Third failure	125
(Failure on more than three occasions may result in charges looking to removal.)	

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